

Whitnum v Plastic & Reconstructive Surgery, P.C.
2014 NY Slip Op 33774(U)
October 21, 2014
Supreme Court, Westchester County
Docket Number: 19222/09
Judge: Francesca E. Connolly
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED

OCT 21 2014

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
LISA WHITNUM,

Plaintiff,

-against-

DECISION and ORDER
Sequence Nos. 11-17
Index No. 19222/09

PLASTIC & RECONSTRUCTIVE SURGERY, P.C.
AND DAVID PALAIA,

Defendants.

-----X
CONNOLLY, J.

The following documents were read in connection with the parties' seven pending motions:

Plaintiff's notice of motion for leave to renew (Seq. No. 11), affidavit, exhibits	1-4
Plaintiff's notice of motion for change of venue (Seq. No. 12), motion for change of venue, affidavit	5-7
Plaintiff's notice of motion to re-create the record (Seq. No. 13), motion to re-create the record, affidavit, exhibit	8-11
Defendant's notice of cross motion for sanctions and an injunction (Seq. No. 14), affirmation, exhibits	12-17
Plaintiff's notice of motion to disqualify (Seq. No. 15), motion to disqualify, exhibits A-U	18-40
Plaintiff's reply to affirmation, exhibits A-C	41-44
Defendants' reply, exhibit	45-46
Plaintiff's notice of cross motion for summary judgment (Seq. No. 15), cross motion for summary judgment, exhibits A-F	47-54
Plaintiff's exhibits V-JJ	55-69
Defendants' affirmation in opposition, exhibits	70-74
Plaintiff's notice of motion for leave to renew (Seq. No. 17), motion for leave to renew, affidavit, proposed order	75-79

In 2009, the plaintiff, acting pro se, commenced this action sounding in medical malpractice, breach of contract, fraud, assault and battery, and other legal theories, against the defendants Dr. David Palaia and Plastic & Reconstructive Surgery, P.C. In early 2006, the plaintiff was diagnosed

with cancer in her left breast, leading to a left-sided radical mastectomy (which was performed by a non-party). After numerous consultations regarding her breast reconstruction options, on December 6, 2006, Dr. Palaia performed surgery on the plaintiff to reconstruct her left breast and to simultaneously augment her right breast. Following the surgery, the plaintiff complained that her breasts were too large and that the implants were not the type she had requested.

Following discovery, the defendants moved for summary judgment (Motion Seq. No. 7). The plaintiff opposed the motion by submitting a document entitled: "Affidavit in Opposition to Motion for Summary Judgment and Cross Motion for Partial Summary Judgment." The plaintiff also submitted a memo of law and various exhibits.

In an order dated June 27, 2013, this Court granted the defendant's motion for summary judgment dismissing the action in its entirety because, among other reasons, the plaintiff had failed to submit the affirmation of a medical expert in opposition to the defendants' prima facie showing that Dr. Palaia had not deviated from the standard of care. Of relevance to the issues presently raised by the plaintiff, in that order, this Court listed the papers considered in support of and opposition to the motion, which included "Plaintiff's Affidavit in Opposition" and "Exhibits," which were numbered as papers 16-37, and "Plaintiff's Memorandum of Law," which was numbered as paper 38.¹ In a footnote, the order noted:

Although plaintiff styles her opposition papers in part as a cross-motion, the purported cross-motion lacks any hallmarks of a notice of a cross-motion, including a return date or the requisite notice for the timing of responsive papers. Plaintiff did not pay the required fees for filing a motion (see CPLR § § 2214, 2215). The Court shall consider plaintiff's submission as opposition to defendants' motion only.

(Order dated June 27, 2013 at 1, n 1).

After the defendant's motion for summary judgment was granted, the plaintiff filed three motions: (1) a motion for an extension of time (Seq. No. 8), (2) a motion for leave to reargue (Seq. No. 9), and (3) a motion for leave to renew (Seq. No. 10). In an order dated December 16, 2013, this Court denied those three motions, noting that the plaintiff had failed to demonstrate that the Court had overlooked or misapprehended any matters of law or fact in making its determination, and that the newly-proffered lay affidavit of the plaintiff's friend failed to raise a triable issue of fact as to the defendants' alleged malpractice.

The plaintiff subsequently made numerous calls and visits to the Undersigned Justice's chambers claiming that she could not locate copies of certain motion papers that were filed in connection with the defendant's motion for summary judgment. The plaintiff accused the Undersigned of "dumping her papers in the garbage," which precluded the plaintiff from perfecting

¹ An order determining a motion is statutorily required to "recite the papers used on the motion" (*see* CPLR 2219 [a]).

an appeal. On each occasion that the plaintiff attempted to contact the Undersigned, my staff informed her that all of the papers filed in support of and in opposition to the defendant's motion for summary judgment were transferred to the County Clerk on or about June 27, 2013, when the defendant's motion for summary judgment was decided. Additionally, the plaintiff's requests to speak with or meet with the Undersigned were denied by my staff.

The plaintiff has made numerous calls to chambers asking when her motions would be decided, apparently confusing the date that a motion is filed with the date that a motion is marked submitted. In a letter dated August 14, 2014, this Court granted the plaintiff an adjournment to oppose the defendant's cross motion for sanctions and to submit reply papers. Accordingly, motion sequences 11, 12, 13, and 14 were adjourned at the plaintiff's request to September 10, 2014. Notably, on September 11, the plaintiff filed a new cross motion (Seq. No. 16), with a return date of September 30, 2014, moving the return date for all pending motions to October 1, 2014.²

The plaintiff has now filed a flurry of motions. Presently pending are six motions by the plaintiff seeking various forms of relief (Seq. Nos. 11, 12, 13, 15, 16, and 17) and one motion by the defendants to enjoin the plaintiff from making further motions and for the imposition of sanctions (Seq. No. 14). For the reasons that follow, the plaintiff's motions are denied and the defendants' motion is granted in part.

DISCUSSION/ANALYSIS

I. THE ALLEGED MISSING DOCUMENTS ARE ON FILE WITH THE COUNTY CLERK

As an initial matter, the central allegation in the plaintiff's motions is that the papers submitted in support of and in opposition to the defendant's motion for summary judgment have gone missing. She accuses this Court—inaccurately—of sabotaging her efforts to appeal and of destroying original motion papers.

However, the plaintiff's claim that the papers are missing from the County Clerk's office is incorrect, and appears to flow from her fundamental misunderstanding of how papers are filed in the County Clerk's office. The plaintiff has submitted a printout from the County Clerk's office entitled "Court Record Details" (*see* Exhibit to Motion to Re-create the Record) and she claims that all documents filed from December 2012 to February 2013 are missing (*see* Motion to Re-create the Record ¶ 1). The Court recognizes this printout to be a list of documents filed with the County Clerk related to her case.

While the defendants' motion for summary judgment and the plaintiffs' opposition papers were filed in the period from October 2012 to February 2013, in which there are no entries in the

² This Court's motion day is Wednesday. Any motion made returnable on a different day of the week is administratively adjourned to the following Wednesday. Since September 30, 2014 was a Tuesday, the motions were made returnable on October 1, 2014, a Wednesday.

proffered document list, the plaintiff fails to appreciate that individual motion papers are not individually scanned and entered on their date of filing by the County Clerk. Instead, original motion papers are received by the Clerk of the Supreme Court³ and forwarded to the justice assigned to the case. When a justice renders a determination on a motion, an original copy of the order deciding the motion *and all of the underlying papers* are forwarded to the County Clerk for filing.

Accordingly, the motion documents that the plaintiff alleges are missing would not be located chronologically in the County Clerk's records on the date they were filed by a litigant, but rather, on the date that the order determining the motion was filed.

According to the document list submitted by the plaintiff, the decision and order granting the plaintiff's motion was filed with the County Clerk on June 27, 2013. Notably, the very next entry in the document list is entitled, "MOTION/SUPPORTING PAPERS/EXHIBITS," which was also filed on the same date as the order, June 27, 2013.

Thus, it appears that the plaintiff has been looking in the **wrong location** for the purported missing motion papers.

Furthermore, this Court has examined an electronic version of the supporting papers that were filed with the County Clerk's office on June 27, 2013 and **each and every document that this Court considered has in fact been duly filed with the County Clerk, including the defendant's motion papers, the plaintiff's opposition papers, and the defendants' reply.**

These records are publicly available through Westchester Records Online, which may be accessed at wro.westchesterclerk.com. By viewing the images associated with the motion supporting papers, a user will find a 470 page PDF document containing all of the motion supporting papers. For the plaintiff's convenience, the Court notes that the plaintiff's papers that were filed in opposition to the motion for summary judgment begin on page 247 of that PDF.

II. THE PLAINTIFF'S MOTIONS ARE DENIED

With the foregoing in mind, the plaintiff's motions are individually decided as follows:

1. Motion to renew (Seq. No. 11)

The plaintiff contends that the documents from the underlying summary judgment motion are missing due to "purposeful sabotage or incompetence" by the Court. Accordingly, she moves to renew.

³ The plaintiff is advised that the "Clerk of the Supreme Court" and the "County Clerk" are two different persons who comprise separate and distinct offices.

Leave to renew is denied as the plaintiff has failed to identify any new facts not offered on the prior motion that would change the prior determination or demonstrate that there has been a change in the law that would change the prior determination (CPLR 2221 [e] [2]-[3]).

2. Motion for change of venue (Seq. No. 12)

The plaintiff seeks a change of venue because she believes that the aforementioned documents have vanished. She alleges that “prejudice is at play” which is “personal, calculated, and malicious.” The plaintiff contends that she “cannot get fairness at the White Plains Courthouse as she once ran for public office in a minor role but she was vocal about a controversial topic and she has many enemies who wish to hurt her in any possible way.”

The motion is denied, as the plaintiff has failed to set forth a basis for a change of venue (*see generally* CPLR article 5).

3. Motion to re-create the record (Seq. No. 13)

The plaintiff’s motion to re-create the record is denied, since, for the reasons previously stated in this order, the plaintiff has failed to demonstrate that any part of the record is missing. Further, the plaintiff has failed to proffer any evidence whatsoever that she filed a notice of cross motion or paid the filing fee for a cross motion when she opposed the defendants’ motion for summary judgment.

4. Motion to disqualify (Seq. No. 15)

The plaintiff moves to disqualify the Undersigned alleging that documents have “vanished” and that “prejudice is at play.”

The motion is denied. As an initial matter, the plaintiff has not identified a ground for disqualification (*see* Judiciary Law § 14 [Disqualification of judge by reason of interest or consanguinity]). Moreover, to the extent that her motion could be viewed as an application for the Undersigned to recuse from the action, in the exercise of discretion, the motion is denied (*see Schwartzberg v Kingsbridge Hgts. Care Ctr., Inc.*, 28 AD3d 465, 466 [2d Dept 2006] [“In the absence of a legal disqualification under Judiciary Law § 14, a trial judge is the sole arbiter of the need for recusal, and his or her decision is a matter of discretion and personal conscience”]). The Undersigned has no relationship to any person with an interest in this action, does not harbor any bias toward any party to this action, and the plaintiff has further failed to identify any basis for which recusal would be warranted. Accordingly, the Undersigned will not recuse.

5. Cross motion for summary judgment (Seq. No. 16)

The plaintiff’s cross motion for summary judgment is denied as untimely, as the plaintiff’s case has been dismissed and the issues raised therein have already been decided.

6. Motion for leave to renew (Seq. No. 17)

Finally, the plaintiff's motion to renew, which is her *third* motion to renew filed in this action is denied, as she has failed to set forth any basis for granting leave to renew (*see* CPLR 2221 [e]).

III. THE DEFENDANTS' MOTION IS GRANTED IN PART

The defendants contend that the plaintiff's motions are completely without merit and have caused the defendants to waste valuable time and resources. The defendants request sanctions and an order precluding the plaintiff from making any further motion in this matter.

In opposition, the plaintiff claims that the defendants' attorneys have failed to help her compile the purported missing documents so that she can take an appeal. She also claims that without the missing documents she cannot verify that she paid the filing fee for a cross motion. She believes that she has been treated unfairly by the Undersigned and that it is not her fault that the documents have gone missing.

As an initial matter, for the reasons outlined in this order, the Court finds the plaintiffs' conduct in filing six motions relating to the purported destruction of papers to be frivolous, in that her motions are "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR 130-1.1 [c] [1] [definition of frivolous conduct]). While the plaintiff's conduct has been frivolous, the Court will, at this time, decline to impose monetary sanctions, as the plaintiff's conduct has been, in part, due to her misunderstanding of the filing process.

The plaintiff is hereby placed on notice that should she continue to engage in frivolous conduct by filing meritless motions, or by engaging in conduct undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another, or by asserting material factual statements that are false, she shall be subject to sanctions pursuant to 22 NYCRR 130-1.1.

However, the branch of the defendants' motion which is to enjoin the plaintiff from making any further motions in this action without first obtaining written leave of Court is granted. While "public policy generally mandates free access to the courts . . . a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will" (*Vogelgesang v Vogelgesang*, 71 AD3d 1132, 1134 [2d Dept 2010]). "[A] litigious plaintiff pressing a frivolous claim can be extremely costly to the defendant and can waste an inordinate amount of court time, time that [the court system] can ill afford to lose" (*Sassower v Signorelli*, 99 AD2d 358, 359 [2d Dept 1984]).

This Court has carefully reviewed the proceedings taken in this action by the plaintiff. Since the action was dismissed, the plaintiff has now filed nine motions, all of which have been denied.

The plaintiff has filed motions that have no basis in law or fact and, in the Court's opinion, to permit the plaintiff to continue would risk wasting more of this Court's valuable time and resources, and would be fundamentally unfair and costly to the defendants.

Accordingly, the plaintiff is enjoined from filing any further motions in this action in this Court without first obtaining written leave of the Court.

Based upon the foregoing, it is hereby

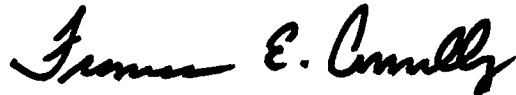
ORDERED that the plaintiff's motions (Seq. Nos. 11, 12, 13, 15, 16, and 17) are denied in their entirety; and it is further

ORDERED that the defendant's cross motion (Seq. No. 14) is granted to the extent that the plaintiff is enjoined from filing any further motions in this action in this Court without first obtaining written leave of the Court, and the motion is otherwise denied, without prejudice should the plaintiff violate the injunction; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
October 21, 2014



HON. FRANCESCA E. CONNOLLY, J.S.C.

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